IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| GERALDINE SMITH, | ) | |
| | ) | |
| Plaintiff, | ) | Civil Action No. 14-717 |
| | ) | |
| V. | ) | |
| | ) | Hon. Terrence F. McVerry |
| BETTER BUSINESS BUREAU OF WESTERN PA, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | Electronically filed. |

**ANSWER TO COMPLAINT AND ADDITIONAL DEFENSES**

The defendant Better Business Bureau of Western PA ("BBB"), by and through its undersigned counsel, hereby files the following Answer to Complaint and Additional Defenses to the Civil Complaint ("Complaint") Plaintiff Geraldine Smith ("Smith") filed in this matter. The numbered paragraphs below respond to the identically numbered paragraphs in Smith's Complaint.

**ANSWER**

**I. Jurisdiction**

1. The averments in Paragraph 1 of the Complaint are conclusions of law to which no responsive pleading is required. To the extent a response is necessary, the BBB denies the averments.

2. The averments in Paragraph 2 of the Complaint are conclusions of law to which no responsive pleading is required. To the extent a response is necessary, the BBB admits that Smith filed a charge alleging race, genetic, and disability discrimination with the Equal Employment Opportunity Commission ("EEOC") on about June 7, 2013, that the charge was cross-filed with the Pennsylvania Human Relations Commission, and that the EEOC issued a

Notice of Right to Sue on February 7, 2014. The BBB lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments and, therefore, denies those averments.

## II. Parties

3. The averments in Paragraph 3 of the Complaint are admitted in part and denied in part. The BBB admits that Smith is an adult individual. The BBB lacks knowledge or information sufficient to form a belief as to Smith's current residential address and, therefore, denies those averments.

4. The averments in Paragraph 4 of the Complaint are denied. The BBB lacks knowledge or information sufficient to form a belief as to the truth of whether Smith's daughter has AIDS and, therefore, denies those averments. The remaining averments are conclusions of law to which no responsive pleading is required. To the extent a response is necessary, the BBB denies those averments.

5. The BBB admits the averments in Paragraph 5 of the Complaint.

6. The averments in Paragraph 6 of the Complaint are admitted in part and denied in part. The BBB admits that, at all relevant times, the BBB employed at least 15 employees, including Smith. The remaining averments are conclusions of law to which no responsive pleading is required. To the extent a response is necessary, the BBB denies those averments.

## III. Factual Background

7. The BBB admits the averments in Paragraph 7 of the Complaint.

8. The BBB denies the averments in Paragraph 8 of the Complaint. To the contrary, Smith's employment history with the BBB has been wrought with excessive absenteeism, tardiness, and early quits and Smith has received performance scores of "needs improvement" in numerous areas including but not limited to "communications," "dependability," "job knowledge," "judgment," "quality" and "quantity."

9. The averments in Paragraph 9 of the Complaint are admitted in part and denied in part. The BBB admits that Smith advised the BBB that her daughter had AIDS. The BBB further admits that Smith offered many different excuses for her excessive absenteeism, tardiness, and early quits, including, but not limited to, Smith's various illnesses, doctor's appointments, car troubles, oversleeping, housing issues, and court appearances, as well as medical and non-medical problems that involved Smith's daughter and/or her grandchildren. The BBB denies the remaining averments in Paragraph 9.

10. The averments in Paragraph 10 of the Complaint are admitted in part and denied in part. The BBB admits that Smith informed the BBB that had daughter had AIDS. The BBB denies the remaining averments in Paragraph 10.

11. The averments in Paragraph 11 of the Complaint are admitted in part and denied in part. The BBB admits that, in approximately October 2011, Smith expressed an interest in an open Dispute Resolution Specialist position and, on or about October 31, 2011, the BBB hired a new female employee to fill that job. The BBB denies the remaining averments in Paragraph 11.

12. The averments in Paragraph 12 of the Complaint are admitted in part and denied in part. The BBB admits that, in approximately October 2012, Smith expressed an interest in an open Dispute Resolution Specialist position and, on or about October 29, 2012, the BBB promoted a different current female employee to fill that position. The BBB denies the remaining averments in Paragraph 12.

13. The BBB denies the averments in Paragraph 13 of the Complaint.

14. The averments in Paragraph 14 of the Complaint are admitted in part and denied in part. The BBB admits that Warren King told Smith she was not selected for the Dispute Resolution Specialist position because of her attendance problems. The BBB further admits that it disciplined and/or counseled Smith for attendance problems on multiple occasions, including,

but not limited to, on or about September 1, 2009, April 8, 2010, December 31, 2010 and October 2, 2013. Finally, the BBB avers that, attached hereto as Exhibit A, is a summary that reflects Smith's excessive absenteeism, tardiness, and early quits for the period of January 1, 2010 through October 1, 2013 (following which she commenced a long leave of absence related to her shoulder surgery). The BBB denies the remaining averments in Paragraph 14.

15. The averments in Paragraph 15 of the Complaint are admitted in part and denied in part. The BBB admits that it hired two females for the open Dispute Resolution Specialist jobs, that each of them was qualified for the position, and that when it hired each of them, the BBB did not know whether they had any relationship with any individual with a disability. The BBB denies the remaining averments in Paragraph 15. By way of further response, the BBB avers that Smith was not qualified for the open Dispute Resolution Specialist jobs. Completing many tasks with time sensitive deadlines is an essential function of the Dispute Resolution Specialist job and Smith's excessive absenteeism, tardiness, and early quits rendered her unreliable and, therefore, not able to perform the essential functions of that job.

**Count I**
**Americans with Disabilities Act: Associational Discrimination**

16. The BBB incorporates its responses to Paragraphs 1 through 15 above as if restated herein.

17. The averments in Paragraph 17 are admitted in part and denied in part. The BBB admits that Smith advised the BBB that her daughter has AIDS. The BBB denies the remaining averments in Paragraph 17.

18. The BBB denies the averments in Paragraph 18 of the Complaint.

19. The BBB denies the averments in Paragraph 19 of the Complaint.

20. The BBB denies the averments in Paragraph 20 of the Complaint.

21. The BBB denies the averments in Paragraph 21 of the Complaint.

**Count II**
**42 U.S.C. § 1981**
**Race Discrimination**

22. The BBB fully incorporates its responses to Paragraphs 1 through 21 above as if restated herein.

23. The BBB denies the averments in Paragraph 23 of the Complaint.

24. The BBB denies the averments in Paragraph 24 of the Complaint.

25. The BBB denies the averments in Paragraph 25 of the Complaint.

**Count III**
**Title VII, Race Discrimination**

26. The BBB fully incorporates its responses to Paragraphs 1 through 25 above as if restated herein.

27. The BBB denies the averments in Paragraph 27 of the Complaint.

28. The BBB denies the averments in Paragraph 28 of the Complaint.

29. The BBB denies the averments in Paragraph 29 of the Complaint.

## ADDITIONAL DEFENSES

1. Smith's Complaint fails to state a claim, in whole or in part, upon which relief can be granted.

2. Smith's claims, if any, are barred, in whole or in part, by the applicable statute of limitations.

3. The BBB's decisions not to promote Smith were based upon legitimate, non-discriminatory business reasons.

4. Smith was not qualified for the open Dispute Resolution Specialist jobs.

5. Smith was not able to work for the period of approximately October 2, 2013 through April 6, 2014 2014 due to her shoulder surgery and, therefore, is not entitled to recover any amounts for that period.

6. Smith cannot raise a failure to accommodate claim under the ADA based upon her association with her daughter.

Dated: August 4, 2014

Respectfully submitted,

/s/ Mariah L. Passarelli

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# EXHIBIT A

## Summary of Smith Attendance Records 2010 - 2013

**2010**

In 2010, after using her six allotted sick days and 10 allotted vacation days, Smith missed 10 additional days without pay and was late or left early (by at least 15 minutes) on no less than 20 occasions.

**SMITH'S ATTENDANCE RECORDS - 2010**

| | Late Arrival/ Early Quit (15 min. or more) | Sick Days | Vacation Days | Unpaid Days |
|---|---|---|---|---|
| 1 | 1/4/2010 | 1/11/2010 | 4/1/2010 | 8/11/2010 |
| 2 | 2/8/2010 | 1/12/2010 | 4/5/2010 | 9/9/2010 |
| 3 | 2/2/2010 | 1/25/2010 | 4/6/2010 | 9/14/2010 |
| 4 | 2/4/2010 | 2/9/2010 | 4/7/2010 | 9/15/2010 |
| 5 | 3/17/2010 | 2/19/2010 | 4/23/2010 | 9/20/2010 |
| 6 | 2/23/2010 | 2/26/2010 | 5/21/2010 | 10/8/2010 |
| 7 | 5/17/2010 | | 6/21/2010 | 11/3/2010 |
| 8 | 6/2/2010 | | 7/26/2010 | 11/30/2010 |
| 9 | 6/28/2010 | | 8/10/2010 | 12/14/2010 |
| 10 | 6/22/2010 | | | 12/31/2010 |
| 11 | 7/7/2010 | | | |
| 12 | 7/15/2010 | | | |
| 13 | 8/3/2010 | | | |
| 14 | 8/27/2010 | | | |
| 15 | 9/1/2010 | | | |
| 16 | 9/30/2010 | | | |
| 17 | 10/18/2010 | | | |
| 18 | 11/1/2010 | | | |
| 19 | 11/17/2010 | | | |
| 20 | 12/28/2010 | | | |

**2011**

In 2011, after using her six allotted sick days and 10 allotted vacation days, Smith missed 10 additional days without pay and was late or left early (by at least 15 minutes) on no less than 35 occasions.

**SMITH'S ATTENDANCE RECORDS - 2011**

| | Late Arrival/ Early Quit (15 min. or more) | Sick Days | Vacation Days | Unpaid Days |
|---|---|---|---|---|
| 1 | 3/15/2011 | 1/19/2011 | 1/24/2011 | 7/12/2011 |
| 2 | 3/17/2011 | 2/8/2011 | 4/4/2011 | 7/13/2011 |
| 3 | 3/25/2011 | 2/9/2011 | 4/5/2011 | 7/14/2011 |
| 4 | 3/29/2011 | 2/10/2011 | 4/6/2011 | 9/6/2011 |
| 5 | 5/10/2011 | 3/3/2011 | 5/25/2011 | 9/27/2011 |
| 6 | 5/18/2011 | 4/4/2011 | 5/31/2011 | 10/12/2011 |
| 7 | 5/24/2011 | | 6/23/2011 | 11/7/2011 |
| 8 | 5/27/2011 | | 6/16/2011 | 11/17/2011 |
| 9 | 6/14/2011 | | 6/17/2011 | 12/8/2011 |
| 10 | 7/1/2011 | | 7/11/2011 | 12/16/2011 |
| 11 | 7/7/2011 | | | |
| 12 | 7/19/2011 | | | |
| 13 | 7/29/2011 | | | |
| 14 | 8/29/2011 | | | |
| 15 | 9/2/2011 | | | |
| 16 | 9/8/2011 | | | |
| 17 | 9/15/2011 | | | |
| 18 | 9/20/2011 | | | |
| 19 | 9/29/2011 | | | |
| 20 | 10/3/2011 | | | |
| 21 | 10/4/2011 | | | |
| 22 | 10/7/2011 | | | |
| 23 | 10/11/2011 | | | |
| 24 | 10/18/2011 | | | |
| 25 | 10/27/2011 | | | |
| 26 | 11/11/2011 | | | |
| 27 | 11/23/2011 | | | |
| 28 | 12/2/2011 | | | |
| 29 | 12/12/2011 | | | |
| 30 | 12/13/2011 | | | |
| 31 | 12/14/2011 | | | |
| 32 | 12/15/2011 | | | |
| 33 | 12/21/2011 | | | |
| 34 | 12/23/2011 | | | |
| 35 | 12/30/2011 | | | |

**2012**

In 2012, after using her 6 allotted sick days and 10 allotted vacation days, Smith missed 12 additional days without pay, and was late or left early (by at least 15 minutes) on no less than 24 occasions.

**SMITH'S ATTENDANCE RECORDS - 2012**

| | Late Arrival/ Early Quit (15 min. or more) | Sick Days | Vacation Days | Unpaid Days |
|---|---|---|---|---|
| 1 | 1/10/2012 | 1/25/2012 | 1/16/2012 | 8/10/2012 |
| 2 | 1/11/2012 | 1/26/2012 | 1/17/2012 | 8/13/2012 |
| 3 | 2/9/2012 | 2/6/2012 | 3/13/2012 | 9/5/2012 |
| 4 | 3/15/2012 | 2/7/2012 | 4/26/2012 | 9/21/2012 |
| 5 | 3/21/2012 | 4/2/2012 | 4/27/2012 | 9/24/2012 |
| 6 | 3/30/2012 | 5/29/2012 | 5/21/2012 | 9/25/2012 |
| 7 | 4/16/2012 | | 6/14/2012 | 9/26/2012 |
| 8 | 4/19/2012 | | 6/15/2012 | 9/27/2012 |
| 9 | 4/20/2012 | | 6/20/2012 | 10/2/2012 |
| 10 | 5/14/2012 | | 7/31/2012 | 10/30/2012 |
| 11 | 5/16/2012 | | | 10/31/2012 |
| 12 | 5/18/2012 | | | 11/26/2012 |
| 13 | 6/6/2012 | | | |
| 14 | 6/13/2012 | | | |
| 15 | 7/3/2012 | | | |
| 16 | 7/9/2012 | | | |
| 17 | 7/10/2012 | | | |
| 18 | 7/20/2012 | | | |
| 19 | 8/8/2012 | | | |
| 20 | 8/20/2012 | | | |
| 21 | 9/13/2012 | | | |
| 22 | 9/20/2012 | | | |
| 23 | 11/21/2012 | | | |
| 24 | 12/4/2012 | | | |

## 2013

In 2013, after using her six allotted sick days and 15 allotted vacation days (and counting only through early October), Smith missed an additional 16 days without pay and was late or left early (by at least 15 minutes) on no less than 11 occasions.

**SMITH'S ATTENDANCE RECORDS - 2013**

| | **Late Arrival/ Early Quit (15 min. or more)** | **Sick Days** | **Vacation Days** | **Unpaid Days** |
|---|---|---|---|---|
| 1 | 1/25/2013 | 1/2/2013 | 2/14/2013 | 6/4/2013 |
| 2 | 1/28/2013 | 1/7/2013 | 2/15/2013 | 6/24/2013 |
| 3 | 2/25/2013 | 1/18/2013 | 2/18/2013 | 7/3/2013 |
| 4 | 3/6/2013 | 1/30/2013 | 3/14/2013 | 7/8/2013 |
| 5 | 4/8/2013 | 1/31/2013 | 3/18/2013 | 7/19/2013 |
| 6 | 4/18/2013 | 2/1/2013 | 3/19/2013 | 7/22/2013 |
| 7 | 4/24/2013 | | 3/20/2013 | 7/23/2013 |
| 8 | 5/10/2013 | | 3/21/2013 | 8/12/2013 |
| 9 | 7/26/2013 | | 3/29/2013 | 8/14/2013 |
| 10 | 9/18/2013 | | 4/1/2013 | 8/30/2013 |
| 11 | 9/24/2013 | | 4/2/2013 | 9/2/2013 |
| 12 | | | 4/3/2013 | 9/16/2013 |
| 13 | | | 4/4/2013 | 9/17/2013 |
| 14 | | | 5/13/2013 | 9/3/2013 |
| 15 | | | 6/3/2013 | 9/30/2013 |
| 16 | | | | 10/1/2013 |